Laborers' International Union of North America, Local No. 113, AFL–CIO *and* Super Excavators, Inc. and International Union of Operating Engineers, Local No. 139, AFL–CIO. Case 30–CD–158

October 30, 1998

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

The charge in this Section 10(k) proceeding was filed on March 2, 1998, by the Employer, alleging that the Respondent, Laborers' International Union of North America, Local No. 113, AFL–CIO, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer not to reassign certain work from employees it represents, who were then performing the work, to employees represented by International Union of Operating Engineers, Local No. 139, AFL–CIO. The hearing was held on April 7, 1998, before Hearing Officer Stephen J. Schultz.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Wisconsin corporation, is an underground excavating company with its principal office in Menomonee Falls, Wisconsin. During the 12 months preceding the hearing, it purchased and received goods, materials, and services valued in excess of $50,000 directly from suppliers located outside the State of Wisconsin. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers Local 113 and Operating Engineers Local 139 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

The Employer, as a member of the Wisconsin Underground Contractors Association (WUCA), is signatory to collective-bargaining agreements with both Unions: the Sewer, Tunnel and Water Collective Bargaining Agreement between WUCA and the Wisconsin Laborers' District Council, representing Laborers Local 113; and the Sewer, Water & Tunnel Master Agreement Area I between WUCA and Operating Engineers Local 139.

On November 11, 1997, the Employer began constructing an underground sewer system, known interchangeably as the 26th and Brown Project or the 30th and Meineke Project, for the city of Milwaukee. The construction project encompasses digging seven shafts (or holes in the ground) and 3600 feet of linear tunnel. The shafts are braced vertical excavations, ranging from 55 to 75 feet in depth, and from 24 to 28 feet in diameter. The digging is initiated by a backhoe and crane situated on the surface, weighing in excess of 100,000 pounds and operated by employees represented by the Operating Engineers. Laborers-represented employees perform the below-grade work in the shafts and tunnels, including the manual labor involved in ribbing, lagging, and haypinning in order to shore up the walls of the shafts and tunnels to prevent their collapse. When the shaft is sunk to the desired depth, a mini-excavator or backhoe weighing under 20,000 pounds is lowered onto the bottom of the shaft and used intermittently to assist in the removal of ground from the edges of the vertical shaft and to excavate the tunnels.[1] The mini-excavator or backhoe is a tracked, mobile machine with a hydraulic arm excavator and bucket attached, which is operated by the use of both hand and foot controls.

The Employer assigned to its Laborers-represented employees the operation of the mini-excavator below-grade on the 26th and Brown Project.

On December 16, 1997, Willie D. Ellis, Operating Engineers Local 139's business representative, filed a grievance against the Employer alleging that it "utilized non-bargaining unit members to perform bargaining unit work (Backhoe Excavator)." The grievance does not demand reassignment of the work on the mini-excavator to Local 139 but rather seeks money damages, in the form of back wages and benefits, with interest, for individuals who would have been referred by Local 139 to perform the mini-backhoe excavator work on the 26th and Brown Project. The cover letter states:

> I [Willie D. Ellis] wish to make the position of the International Union of Operating Engineers, Local 139, on this matter absolutely clear. Technically, we have no problem with whomever the employer has operating this piece of equipment. Of course, we would rather see this piece of equipment assigned to a member of our bargaining unit in accordance with the bargaining agreement. However, if this is not the case, we do demand that a bargaining unit member be remunerated in the appropriate amount with regard to the applicable wage and fringe benefit rates for all hours that the machine(s) was/is in operation.

The Employer's vice president, Jeff Weakly, replied by letter of December 31, 1997, asserting that the grievance involved a jurisdictional dispute and the assignment of "all underground work" to Laborers Local 113.

Ellis responded to Weakly on January 21, 1998, as follows:[2]

[1] The excavated material (or muck) from the tunnel construction is gathered and removed by use of conveyor belts and mucking machines, and then manually put into clam buckets and lifted out by the above-ground crane.

[2] Hereinafter all dates refer to 1998.

> Allow us to make our position absolutely clear. We are not concerned with whomever the employer has operating this piece of equipment. . . . Please let me know if we are to consider the December 31 letter as a refusal to process the grievance and/or arbitrate so we may consider whether other litigation options must be pursued.

Weakly's January 28 reply asserted that the Employer was not refusing to process Local 139's grievance and/or arbitrate the dispute.[3]

Thereafter, on about February 3, 1998, Laborers Business Manager William E. Johnson notified Weakly by letter that Local 113 would "do all in it's [sic] power and use all lawful means" to protect the jurisdiction of Local 113 to continue to perform the backhoe work. Johnson again wrote to Weakly on about February 16, stating:

> I have information that Operating Engineers, Local No. 139, continues to pressure Super Excavators to change the assignment from Laborers to Operators. As stated in the February 3, 1998 letter, the work in dispute has historically been performed by Laborers in this area. Should the assignment be changed from Laborers to Operators, Local No. 113 will have no other choice but to *use every means at it's* [sic] *disposal, including striking***,** to protect the Laborers jurisdiction.

The Employer continued its assignment of the work to its employees represented by the Laborers and filed the instant charge.

B. Work in Dispute

The work in dispute is the operation of mini-excavator mobile backhoes below ground in vertical shaft and tunnel construction on the sewer project at 30th and Meineke in Milwaukee, Wisconsin.

C. Contentions of the Parties

Operating Engineers Local 139 moved to quash the notice of hearing,[4] contending that there is no 10(k) dispute because it has expressly disclaimed any interest in reassignment of the work in dispute; it merely filed a grievance requesting pay-in-lieu of work, based on its 9(a) representative status and the Employer's contractual obligation to "give [Local 139] first opportunity to dispatch . . . help" when the employer "needs additional employees for work within the [the Union's] jurisdiction."

The Employer and the Laborers assert that a jurisdictional dispute exists, based on both Unions' claims to the work and the Laborers' threat to strike in support of its claim. They argue that Local 139's purported disclaimer is not valid, because the above-quoted December 16, 1997 letter, i.e., "we would rather see this piece of equipment assigned to a member of our bargaining unit," makes clear that Local 139's primary objective was for the assignment of the work. They further argue that the alleged disclaimer is belied by Local 139's action in seeking payment-in-lieu of the disputed work and by adducing evidence with respect to the factors, i.e., collective-bargaining agreement, skills, safety, area, industry, and employer practice, that it contends favor an award of the disputed work to employees it represents.

The Employer and the Laborers further assert that an award in favor of employees represented by the Laborers is justified by the Laborers' collective-bargaining agreement, employer preference and past practice, and area and industry practice. In addition, the Employer points out that familiarity and competency by the Laborers-represented employees are especially important in the shoring process, which requires two 2-man teams experienced in that work on each crew, and that safety and efficiency and economy of operations would be compromised if employees represented by the Operating Engineers were assigned to perform the work in dispute because an additional employee would have to be hired for each underground excavation crew to assist in that shoring activity.[5]

D. Applicability of the Statute

Before the Board may proceed with a determination of dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.

Initially, we find that there are competing claims for the work. Thus, the Laborers have at all times claimed the work in dispute, and Local 139 has, despite its protestations, claimed the work by virtue of its admission in its December 16, 1997 letter, that it was seeking assignment of the disputed work and also by filing a pay-in-lieu grievance.[6] We further find that the Laborers, by letter of

[3] An attorney for Local 139 subsequently sent Weakly a Request for Arbitration Panel form for signature and return. When the Employer failed to respond, Local 139 submitted the form unilaterally.

[4] The hearing officer denied the motion to quash.

[5] According to the Employer and the Laborers, a Laborers-represented employee operating the mini-excavator assists those engaged in shoring activity from his or her vantage point on the machinery and also works alongside them when the machine is not in use, whereas a mini-excavator operator represented by the Operating Engineers would not be qualified to do so.

[6] Contrary to our dissenting colleague's view, *Laborers (Capitol Drilling Supplies),* 318 NLRB 809 (1995), is inapplicable to this case. In *Capitol Drilling,* the Board held that a union's action through a grievance procedure to enforce an arguably meritorious claim against a general contractor in breach of a lawful union signatory clause does not, without more, constitute a claim to the work being performed by a subcontractor's employees. The Board relied on the fact that there were two disputes in that case, one regarding the actions of the general contractor, and one involving the actions of the subcontractor who ultimately had assigned the work to a specific group of employees. The Board quashed the notice of 10(k) hearing, noting that the union which had filed the grievance against the general contractor on a contractual issue had not thereby made a *competing* claim directed at the subcon-

February 16, 1998, threatened to take economic action, including striking, against the Employer if the work was reassigned to Local 139.

Moreover, the Employer, the Laborers, and the Operating Engineers stipulated at the hearing that there is no agreed-upon method for voluntary adjustment of the work in dispute.

In a 10(k) proceeding the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding a violation. Inasmuch as we find that the Laborers' February 16 letter constitutes a threat of economic action if the work were reassigned to the Operators, reasonable cause exists to believe that a violation of Section 8(b)(4)(D) has occurred within the meaning of Section 10(k) of the Act. We further find that there is no agreed-upon method for voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination. Therefore, we find no merit in the Operating Engineers' argument that the notice of hearing should be quashed.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction),* 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence that either Union has been certified to represent employees performing the disputed work. Both Unions assert, however, that their collective-bargaining agreements entitle them to the disputed work.

As indicated, the Employer, through the Wisconsin Underground Contractors Association, is a party to separate collective-bargaining agreements, both effective through May 31, 1998, with the Unions. The Sewer, Tunnel and Water Collective Bargaining Agreement between WUCA and the Wisconsin Laborers' District Council, representing Local 113, encompasses the excavation of all shafts and tunnels within the Laborers' jurisdiction, including "all underground work involved in mines . . . tunnels, or shafts for any purpose." Under WUCA's Sewer, Water and Tunnel Master Agreement Area I, Local 139 is given the first opportunity to dispatch help when the "employer needs additional employees for work [within their jurisdiction]" and lists employees in job classifications which include all heavy equipment operators who operate backhoes (excavators) under 130,000 pounds.[7] Based on the above evidence, we find that both collective-bargaining agreements arguably encompass the work in dispute and that this factor therefore does not clearly favor an award to either group of employees.

2. Employer preference and assignment

The Employer prefers to assign, and has assigned, all below-grade work to employees represented by the Laborers because they are familiar and experienced in the shoring-up procedures and help to fill the two two-man teams required on each crew. Accordingly, we find that the factor of the Employer's preference and assignment favors an award of the disputed work to employees represented by the Laborers.

3. Area and industry practice

The evidence presented indicates that the Employer has, in the great majority of its excavation projects, assigned the work of operating the mini-excavator to employees represented by the Laborers. The Operating Engineers, however, adduced evidence showing that employees they represent were also assigned that work on a number of the Employer's projects, and not just in a few highly unusual situations as the Laborers contend. Both Unions introduced evidence of area and industry practice that they claim supports awarding the disputed work to employees they represent. We find from the foregoing evidence that the factor of the Employer's past practice and the area and industry practice does not clearly favor either group.

4. Relative skills and training

The Operating Engineers presented evidence that Operating Engineers-represented employees are given extensive training on all backhoes and other related machinery. The Laborers and the Employer adduced testimony showing that Laborers-represented employees are fully qualified by training or experience to perform the disputed work. Accordingly, we find that this factor does not favor an award to either employee group.

tractor who had assigned the work., Id. at 810–811 fn. 4. The Board did not overrule prior cases insofar as they held that a pay-in-lieu grievance may constitute a competing claim for work. See *Carpenters Los Angeles Council (Swinerton & Walberg),* 298 NLRB 412, 414 (1990). See also *Local 30, United Slate, Tile & Composition Roofers v. NLRB,* 1 F.3d 1419, 1427 (3d Cir. 1993) (attempted distinction "between seeking the work and seeking pay for the work is ephemeral"). The Board noted in *Capitol Drilling* that a 10(k) proceeding would have been appropriate had the union expanded the dispute by making a direct claim to the contractor. Id. at 811. Here, there is only one Employer involved and the Operating Engineers and the Laborers have each attempted to establish its rightful claim to the disputed work assigned by that Employer.

[7] As indicated previously, mini-excavators weigh less than 20,000 pounds.

5. Economy and efficiency of operations

The undisputed record evidence reveals that the mini-excavator is operated at most for 3 or 4 hours during an 8-hour shift and for only about 1 to 1-1/2 hours when encountering difficult soil conditions. The evidence further shows that during those times when the mini-excavator is idle, Laborers-represented mini-excavator operators assist in the manual shoring-type work which Operating Engineers-represented operators are incapable of performing. The necessity of hiring an extra employee to fill the two-man teams on each crew in the event the work were awarded to Operating Engineers-represented employees favors awarding the work in dispute to employees represented by the Laborers in the interest of economy and efficiency of operations.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers' International Union of North America, Local No. 113, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, assignment, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Super Excavators, Inc. represented by Laborers' International Union of North America, Local No. 113, are entitled to perform the operation of the mini-excavator (backhoe) in below-grade shaft and tunnel excavations on the sewer project ongoing at the 30th and Brown Project in Milwaukee, Wisconsin.

MEMBER HURTGEN, concurring.

I agree with the majority. I write separately only to express my misgivings about *Laborers (Capitol Drilling Supplies)*.[1] Indeed, I am inclined to agree with the dissent in that case. However, even assuming arguendo the validity of that case, the situation here is clearly different. In *Capitol Drilling,* one union filed a grievance claim against the general contractor, and the other union made a claim to the subcontractor. The majority held that there were no competing claims. In the instant case, one union filed a grievance claim against the employer, and the other union made a claim *against the same employer*. Thus, there were competing claims.[2]

The dissent contends that the grievance is not a claim for work because it seeks only pay in lieu of the work. The contention has no merit. The pay is sought because the work was not given to the grieving union, and the Employer can avoid the grievance only by giving the work to the grieving union.

Finally, it is not necessary to conclude here that there are in fact competing claims. It is only necessary to find reasonable cause to believe that there are competing claims. That test is easily met here.

MEMBER FOX, dissenting.

Contrary to the majority, I would apply *Laborers (Capitol Drilling Supplies),* 318 NLRB 809 (1995), and find that Operating Engineers Local 139 has not made a competing claim for the work at issue. I would therefore quash the notice of hearing in this proceeding.

The Employer in this case entered into separate collective-bargaining agreements with the Laborers and with the Operating Engineers that both arguably encompass the operation of a mini-excavator. The Employer assigned that work to employees represented by the Laborers, and the Operating Engineers filed a pay-in-lieu grievance to protest the Employer's abrogation of its contractual right of first referral of needed workers for unit work. On learning of the grievance filing, the Laborers threatened to strike if the Employer reassigned the work to the Operating Engineers. The Employer responded by filing the instant 8(b)(4)(D) charge, seeking to defend against the Operating Engineers' grievance by asserting that that filing raises a jurisdictional dispute.

In *Capitol Drilling*, the Board noted that a determination that reasonable cause to believe that Section 8(b)(4)(D) has been violated requires, first, evidence that a party has used proscribed means to enforce its claim to the work in dispute and, second, a showing that there are competing claims to the work between rival groups of employees. The Board held that a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or a court action "does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such action."[1] Thus, even where the other union has made an unlawful threat to enforce its claim to the work, the union which has merely sought to enforce its contractual rights against the general contractor has not presented a "competing claim" to the work and the second prong is not satisfied.

In *Capitol Drilling* the general contractor's contractual commitment was to subcontract work only in accordance with a union signatory subcontracting clause. Here, the Employer-contractor contractually agreed to hire needed workers through the Operating Engineers hiring hall for unit work which, my colleagues agree, arguably encompasses mini-excavator operators. In both cases, the com-

[1] 318 NLRB 809 (1995).

[2] *Laborers Local 1086 (Miron Construction),* 320 NLRB 99 (1995), relied on by the dissent, is distinguishable on the same basis.

[1] *Capitol Drilling*, supra at 810.

plaining unions were seeking merely to enforce lawful contractual provisions.

As the Board explained in *Capitol Drilling*: "If we permit Section 10(k) to defeat a collective-bargaining representative's peaceful efforts at enforcing a proviso-protected subcontracting clause through proper arbitral and judicial channels, when that representative has never approached any employer about the work in question other than the one with which it has contracted, and has never engaged in coercion or threats of coercion relating to the work, then we are effectively thwarting the congressional intent underlying the 8(e) construction industry proviso."[2] Applying that same reasoning to the congressional intent underlying the enforceability of collective-bargaining agreements as a whole under voluntarily agreed-upon dispute resolution procedures, I believe that Section 10(k) should not be used to allow an employer to circumvent its contractual obligations or to defeat a collective-bargaining representative's peaceful efforts at enforcing a voluntarily agreed-upon hiring hall referral provision through the contractual grievance process.

I therefore conclude that by the filing of a pay-in-lieu grievance on the basis of its contractual agreement with the Employer, Operating Engineers Local 139 was not making a "competing claim" for the work within the meaning of Section 8(b)(4)(D) of the Act and that the notice of hearing should be quashed.

[2] Id. at 811. In *Laborers Local 1086 (Miron Construction),* 320 NLRB 99 (1995), where the Board quashed the 10(k) notice in reliance on *Capitol Drilling,* the Board made it clear that it would reach the same result even when a union's "peaceful efforts" at contract enforcement consisted of a pay-in-lieu claim.